

## ***Order of the Tenancy Tribunal***

*Residential Tenancies Act 1986*

*Office of the Tenancy Tribunal*

### **Tenancy Tribunal at Manukau**

#### **Tenancy Address**

30 Ihumatao Quarry Road, Mangere, Auckland 2022
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#### **Applicant**

Full Name
Fletcher Residential Limited

Landowner

#### **Respondents**

Full Name
Squatters

#### **Order of the Tribunal**

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The Tribunal orders that -

1. Fletcher Residential Limited is granted immediate possession of the premises at 30 Ihumātao Quarry Road, Māngere, Auckland, and the appurtenant land, being Allotments 175-176 and part Allotment 174 in the Parish of Manurewa, contained in the computer freehold register NA 758/49 in the Land Registration District of North Auckland.

(Residential Tenancies Act 1986, sections 64 and 65)

#### **Reasons**

1. These proceedings arise from a proposed residential development of land in the vicinity of the prehistoric Otuataua Stonefields at Ihumātao, Māngere, near Auckland International Airport. The applicant, Fletcher Residential Ltd (FRL), owns the land and is preparing to carry out a housing development on it.
  2. An unincorporated organisation called Save our Unique Landscape (SOUL) opposes the development. The respondents are its supporters. They have taken occupancy of a house on the land since April this year. They are identified in these proceedings simply as "Squatters"
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because, according to FRL's evidence, they are taking part in the protest in relays. Different people are there at different times. They have not moved out in response to trespass notices. FRL therefore seeks an order for possession under s65 of the Residential Tenancies Act 1986, which provides as follows -

**65 Eviction of squatters**

*(1) Where, on the application of any person entitled to possession of any residential premises, the Tribunal is satisfied that any other person is in possession of the premises as a squatter or trespasser, or otherwise than pursuant to any right of occupation granted to that person by any person having lawful authority to grant that right to that other person, the Tribunal shall make a possession order granting possession of the premises to the applicant.*

*(2) Nothing in subsection (1) shall limit or affect the provisions of the Trespass Act 1980, or any other remedy that may be available to the person lawfully entitled to possession of the premises.*

*(3) To avoid doubt, the Tribunal has jurisdiction under this section even though the premises are not subject to a tenancy agreement.*

3. On the first hearing day, some of the supporters of SOUL appeared and were represented. FRL's evidence about the property raised the possibility that the house lacked the necessary consents for lawful occupation. Had that been the case, the Tribunal would have been barred from jurisdiction, following the High Court's judgment in *Anderson v FM Custodians Ltd* [2013] NZHC 2423, which held that such a building is not "residential premises" for the purposes of the Residential Tenancies Act 1986. I adjourned the matter to allow further evidence to be called and, as a question of law was involved, gave leave under s93 for the parties to be represented by counsel.
4. The supporters of SOUL did not appear when the hearing was resumed. One of their submissions had been that the land in question was customary Māori land. Counsel for FRL handed up a recent judgment of the Māori Land Court which had determined an application on exactly that issue. The Court granted an order striking out the entire pleadings of the applicants: *Hetaraka, Newton & King v Auckland Council & Fletcher Residential Ltd* 158 Taitokerau MB 248, A20160006578, 14 September 2017, Judge M P Armstrong.
5. FRL also led evidence of the status of the house on the land, as recorded in the Auckland Council's Land Information Memorandum (LIM) of the property. I accept its evidence that there is nothing on the LIM or in the Council property file to indicate that the premises cannot be used lawfully for residential purposes.
6. The LIM does not record a building consent for the house and there is no building consent on the Council property file. FRL submitted that this is probably because the premises were constructed some decades ago, at a time when councils either did not require building permits or consents, or did not strictly enforce any requirements for buildings to have permits or consents. In addition, because of the age of the house, it is possible that the Council records are incomplete, particularly in relation to the earliest construction on the property.
7. On the evidence, it is reasonable to assume that the house pre-dated even the former Building

Act 1991 by some decades. FRL did not find any bylaw that would have required a building permit during the period when the house appears to have been built.

8. When the Building Act 1991 came into force, section 8 provided that *"Except as specifically provided to the contrary in this Act, nothing in this Act shall be read as requiring any building, the construction of which was completed or commenced before the coming into force of... this Act, to meet the requirements of the building code."* Thus the premises were not required to come up to compliance with a building code.
9. Code compliance certificates were not required until the Building Act 1991 came into force. Until then, councils were not required to maintain full records of building consents. Not all local authority property records created before 1991 have survived.
10. I accept FRL's evidence that nothing in the LIM or the Council property file indicates that the house cannot be lawfully occupied, in terms of the Resource Management Act 1991. No resource consents restrict the use or occupation of the premises. There is no record of any abatement notice being issued by the Council preventing occupation of the premises as a residential dwelling.
11. I accept FRL's submission that it would place an unreasonable burden on parties seeking the protection of the Residential Tenancies Act if they were required to prove affirmatively, i.e., on positive evidence, that particular premises could be occupied lawfully as residential premises. The burden would be impossible to satisfy in cases such as this one, involving older buildings whose council documentation may not have survived the ravages of time, the many mergers of local authorities and other administrative changes.
12. Accordingly, there is no bar to the Tribunal's jurisdiction to grant a possession order under s65. FRL is entitled to such an order and it is granted.